

U.S. Department of Labor

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**MAILED: 2/5/2001**

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IN THE MATTER OF:

Michael Orobello  
Claimant

Against

General Dynamics Corporation

Employer/Self-Insurer

and

Director, Office of Workers'  
Compensation Programs, United  
States Department of Labor  
Party-in-Interest

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Case No.: 2000-LHC-0634

\* OWCP No.: 1-122266

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**APPEARANCES:**

David N. Neusner, Esq.  
For the Claimant

Peter A. Schavone, Esq.  
For the Employer/Self-Insurer

Merle D. Hyman, Esq.  
Senior Trial Attorney  
For the Director

**BEFORE: DAVID W. DI NARDI**  
Administrative Law Judge

**DECISION AND ORDER - AWARDING BENEFITS**

This is a claim for worker's compensation benefits under the

Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 20, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit, JX for a Joint exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

**Post-hearing evidence has been admitted as:**

<b>Exhibit No. Date</b>	<b>Item</b>	<b>Filing</b>
CX 23	Attorney Neusner's letter filing his	07/21/00
CX 24	Fee Petition	07/21/00
RX 36	Employer's comments  thereon	07/21/00
RX 37	Attorney Schavone's letter filing the	09/05/00
RX 38 09/05/00	July 27, 2000 report of  Joseph R. Gaeta, M.D.	
RX 39	August 17, 2000 Vocational Analysis and Employability Assessment of Carl Barchi, M.Ed, DCMS	09/05/00

The record was closed on September 5, 2000 as no further documents were filed.

**Stipulations and Issues**

**The parties stipulate (JX 1), and I find:**

1. The Act applies to this proceeding.
2. Claimant and the employer were in an employee-employer relationship at the relevant times.
3. On November 20, 1991 Claimant suffered injuries to his hands and arms in the course and scope of his employment.
4. Claimant gave the Employer notice of the injury in a timely manner.
5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.
6. The parties attended an informal conference on September 15, 1999.
7. The average weekly wage is \$669.34.
8. The Employer voluntarily and without an award has paid temporary total compensation for certain periods of time.

**The unresolved issues in this proceeding are:**

1. The nature and extent of Claimant's disability.
2. The date of his maximum medical improvement.
3. The applicability of Section 8(f) of the Act.

**Summary of the Evidence**

Michael Orobello ("Claimant" herein), sixty-two (62) years of age, with a high school education and three years of college credits and an employment history of manual labor, began working on November 6, 1978 as a carpenter at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He became a trade planner on August 15, 1982 and remained in that job classification until April 12, 1992, at which time he had to stop because of the cumulative effect of his medical problems. (RX 15-RX 18; CX 15)

Claimant has been examined and treated by a number of physicians and Dr. Lawrence Baker, in his June 14, 1988 report, concludes as follows (RX 26):

"It is my medical opinion that Mr. Orobello suffers atherosclerotic coronary artery disease and suffered from that pathology for an indeterminate period of time, in an asymptomatic fashion prior to the events of 7/6/84. It is further my medical opinion that there was probable causal relationship between the exertions expended by Mr. Orobello at work on 7/6/84, which exertions were being performed on a hot humid day, and his development of the beginning symptomatology of an acute MI, eventuating in hospitalization. As a direct consequence of that work related MI, documented during the hospitalization of 7/6/84, there was diminution of coronary and cardiac reserve to the extent that he was at risk for further myocardial damage, which did indeed take place on 8/20/84, necessitating hospitalization. He also had a bout of coronary insufficiency, **i.e.** prolonged coronary pain, 9/23/84. He made a good enough recovery to be able to return to work 12/12/84 and has continued to work. His period of total disability from 7/6/84 up until 12/12/84, is completely consistent with the work related MI's of 7/6/84 and 8/20/84.

"Obviously, those MI's have caused diminution of coronary and cardiac reserve. Although he does not have much in the way of cardiovascular symptomatology, it is certain that he has suffered impairment of his cardiovascular system inasmuch as a certain portion of heart muscle has been replaced by scar tissue. I would estimate his impairment being approximately 20 to 25%. This impairment bears a direct relationship to the work related MI of 7/6/84 and 8/20/84," according to Dr. Baker.

Claimant has also been examined by Robert E. Dean, Ph.D., a Clinical Psychologist, as part of his application for Social Security Administration disability benefits and Dr. Dean states as follows in his September 1, 1992 report (RX 23):

"Mr. Orobello is a man of somewhat below-average height who is stockily-built and overweight. He is balding and appears about his stated chronological age. Mr. Orobello was casually, appropriately dressed and well groomed at the time of examination. He wore support braces on both forearms and wrists, reportedly because of carpal tunnel syndrome and a nerve damage problem in his hands.

"Mr. Orobello was fully oriented and communicated his thoughts in a relevant, logical, coherent fashion. He seemed on interview to be of above-average intellectual capacity. Mr. Orobello manifested no indications of any psychotic symptoms. He related to the examiner in a very pleasant, cooperative, friendly manner. He conducted himself in appropriate fashion throughout the interview, and was frank, straight forward and informative in responding to questions about current and past functioning. No impairment of memory functions was indicated by his responding at any time during the examination. Although there is a history of depression associated with medical problems, Mr. Orobello's mood was not remarkably depressed at the time of examination, and this was attributed to recent great improvement in his functioning as a result of administration of Zoloft, which he has been taking for a little more than two months, according to his account. Mr. Orobello's affect was appropriate to content and of normal range. There was no indication of impairment in concentration at the time of examination.

"The man is a married father of three and grandfather of two who resides with his wife at their home in Waterford. He was employed as a senior planner by the General Dynamics Corporation, where he had worked for 14 years until he was recently laid-off. This was a difficult blow for him emotionally and Mr. Orobello reported that it seemed to him that his lay-off in June of this year was probably related to the fact that he had experienced many health problems during recent years. He noted that he has a heart condition and had two myocardial infarction in 1984. His health problems also include stomach ulcers, a hiatal hernia, and carpal tunnel syndrome and accompanying nerve damage to his hands bilaterally. He said that this nerve damage and carpal tunnel syndrome seem to have been brought about by his work as a carpenter when he began working at General Dynamics Corporation and used various automatic tools which cause a great deal of vibrating to a manual operator.

"Mr. Orobello indicated he has been participating in counseling because of stress and depression associated with his restrictions of functioning resulting from health problems. He has been receiving counseling services since 1990 according to his account. His chief complaint is that 'You can't do anything' when health problems such as he has experienced hamper physical capabilities. Mr. Orobello explained that he has been a very physically active person who has done much heavy labor

throughout his life and has been in and out of hospitals about ten times during the past eight years, with chronic frustration over being unable to do physical chores which he would prefer to do independently and has in the past taken for granted and derived enjoyment and a sense of achievement from doing. Mr. Orobello has been struggling with loss of independence and difficulty in accepting physical limitations. He noted that his wife is a devoted caretaker and support person, yet complained that he resents having to depend upon her to accompany him when he travels out of state, as he would be too worried if he were to travel any significant distance alone, as she would be fearful that he would have a heart attack or other health problem.

"Mr. Orobello explained that he has, as a result of his health difficulties, lost a great deal of personal freedom and he feels diminished by the fact that he 'Can't do what you feel like doing without thinking about it.' He finds it to be a difficult burden to have to ask other people to do chores for him, such as household maintenance tasks when he would much prefer to do them himself and is very uncomfortable in making demands upon other people, such as his younger relatives. However, he noted he experiences chest pain when he exerts himself and therefore usually relies upon that cue to curtail his physical exertion. Mr. Orobello explained that it is frightening and quite distressing to know that his heart condition cannot be corrected by surgery other than a transplant. He frankly stated that it is nerve-racking to be aware of the fact that the "prognosis is not very good." He noted in regard to his restricted range of activities and apprehension about deteriorating health, 'I never planned to end my life this way.'

"Mr. Orobello described frequent experiences of frustration and feeling impatient about having to be "constantly waiting for somebody to do something for you" when he would much prefer to do things himself and not be 'a pain in the neck' for his loved ones, upon whom he wishes that he did not have to rely...

"Despite his obvious preoccupation with these various frustrations and losses in his life over the past several years, Mr. Orobello was able to discuss these matters while demonstrating a good sense of humor and at times laughing ironically about the problems which he is encountering. He indicated that his mood has improved greatly since he began taking Zolof. Mr. Orobello noted that 'things don't look so dark as they were' since he began taking this medicine. He

reported he has not taken any other mood-elevating or other psychiatric drugs.

"Mr. Orobello stated that he has gained 75 pounds during the past year which he attributes to his inactivity in a large part. With his improved mood, however, he is committed to making an effort to gradually lose the excess weight which he has gained. His sleep has improved greatly since he began taking Zoloft. He had previously been sleeping in brief periods of not much more than one hour, off and on through the night time, and he experienced this as being related to his worrying and preoccupation with various difficulties. He seems to be able to free himself from these ruminations so that he can sleep normally since taking the Zoloft, according to his description. Mr. Orobello's emotional duress has also been exacerbated by persistent pain and feelings of numbness in his wrists and fingers, which he understands to be related to the vibrating tools which he used over the years as a carpenter. This pain and his periodic chest pain have increased his depressed mood at times.

"Mr. Orobello said that his improved mood has resulted in his counseling being scheduled less frequently. He was previously at counseling sessions on a weekly basis and is now going every two or three weeks, he reported. His counseling experiences have been helpful to him, including assisting him in dealing with his heightened sense of loss after being laid-off from his job, which was a source of considerable meaning and positive structuring of his life. He noted that he has been working since 1955 and without being in the lifestyle of a full-time employee he has often felt as if he does not 'know where to turn.'

"DIAGNOSTIC IMPRESSION:

Axis I: ...

Axis II: Diagnosis deferred.

Axis III: Multiple medical problems including heart disease, ulcers, hiatal hernia, carpal tunnel syndrome with nerve damage in the fingers associated with vibrating power tools, per history," according to Dr. Dean.

Claimant has also been examined at the Dartmouth-Hitchcock

Medical Center, Sleep Disorders Center, Dartmouth Medical School, Lebanon, New Hampshire, and Dr. Michael J. Sateia, the Center's Director, and a diplomate of the American Board of Sleep Medicine, states as follows in his July 10, 1997 report (RX 24):

DATE OF EVALUATION: 07/10/97

"Michael Orobello is a 59-year-old man referred by Dr. Hamilton for evaluation of obstructive sleep apnea.

"Mr. Orobello reports that he frequently awakens with a startle, feeling that his heart has stopped. This is accompanied by a gasp and occurs up to two to three times per night. The patient's wife reports that he snores. There are no reports of observed apnea nor any other subjective respiratory complaints.

"The patient states that he goes to bed around 11 p.m., watching TV until he falls asleep around midnight. He describes some difficulty falling asleep, although is not aware of any particular worries or stressors. It takes him 30 minutes to an hour to fall asleep on average. He sleeps 2-3 hours and then will awaken with one of his startles. This has occurred for the past 4-5 years. He may have difficulty going back to sleep and sometimes reads in bed until he feels drowsy. He may be awake for an hour to an hour-and-a-half. This cycle may repeat itself again during the night. He generally is out of bed at about 7 a.m.

"The patient does not feel refreshed in the morning. He says that he is constantly in a fog, although is somewhat better as the day goes by. He does not feel alert and almost rear-ended the car last weekend because of his lack of alertness. He does not fall asleep in the workplace or while driving. He does doze off on occasion while watching television. He denies any intentional napping.

"The patient is not aware of any other specific nocturnal symptoms. He does tend to sleep upright in a chair because of his hiatal hernia problem. He denies knowledge of any movement or behavioral disturbance, morning headaches, or enuresis, ancillary symptoms of narcolepsy, nightmares, terrors, panic, or restless legs.

"MEDICAL HISTORY: Mr. Orobello has a cardiac history of two previous myocardial infarctions. He has dyspnea on exertion.



He reports hiatal hernia, peptic ulcer, Raynaud's, carpal tunnel, knee replacement and obesity. He has gained 160 pounds during the past five years. His current weight is listed at approximately 327 pounds.

"PSYCHOSOCIAL HISTORY: Mr. Orobello is married. He is retired from his job as a senior planner for General Dynamics. He feels that he was mistreated in the manner in which he was laid-off and remains somewhat angry regarding this. His mood is otherwise reasonably stable, although I am concerned about some degree of dysphoria that he seems to manifest over the job situation which was some time ago. His Zung Depression Scale is 53 which suggests minimal-to-mild depression. The profile of mood states is not remarkable...

"COMMENTS: Mr. Orobello sleep was monitored for approximately six hours. He spent nearly eight hours in bed but watched television for some time before he felt ready to go to sleep. Once he fell asleep, there was frequent respiratory disturbance and arousal. His total sleep time was a bit under five hours and his sleep efficiency was rather poor at 61%. There was a prolonged sleep latency along with a relatively marked increase in light sleep, little slow-wave sleep, and a moderate reduction in REM to 10%.

"The respiratory recording showed moderate-to-severe obstructive sleep apnea with an index of 48 events per hour of sleep. The baseline oxygen saturation was about 93%. The saturations were moderate to a minimum of about 80%. The patient did snore intermittently for much of the night. I should also note that these results were obtained while the patient was sitting in a reclining chair.

"The EKG showed a stable sinus rhythm without significant ectopy. Tibialis recording showed no evidence of period limb movement disorder.

"CONCLUSION/RECOMMENDATIONS: Mr. Orobello presents for evaluation of obstructive sleep apnea. The study does indeed show significant obstructive apnea with moderate oxygen desaturations and relatively marked sleep disruption. I discussed the treatment options with him. Conservative measures including weight reduction and avoidance of alcohol and sedative hypnotic medications were emphasized. More definitive treatment options including surgery, oral appliances, and nasal CPAP were also discussed. The patient would like to return for a trial of

CPAP and has been scheduled for this.

"Finally, I do think that Mr. Orobello may have an independent psychophysiologic problem initiating sleep that is most likely related to some residual anger and dysphoria regarding previous life events and stressors. However, I think that it is best for us to treat the sleep apnea first and then evaluate where things stand in this respect," according to Dr. Sateia.

Claimant underwent additional testing at the Center and the doctor, as of December 18, 1997, reported as follows (RX 32):

"Mr. Orobello returns for followup for his obstructive sleep apnea and insomnia complaints. Since his last visit on October 6, 1997, he continues to use his nasal CPAP with a Monarch mask at a pressure of 10 cmH20. In addition, he had been taking trazodone at 25 to 50 mg at bedtime, as the need arises for insomnia. He had, furthermore, joined a diet program and has since lost 20 lbs. He denies any complaints related to his sleep nor does he have any daytime symptoms. On occasion, however, he would feel that the Monarch mask may be leaking but he had since then found a remedy for this. He denied any snoring nor any difficulty arising during the day...

**"IMPRESSION:**

Axis I

1. Obstructive sleep apnea syndrome (780.53-0).
2. Insomnia, inadequate sleep hygiene (307.41-1) versus idiopathic insomnia (780.52-7).

Axis II

1. Polysomnography and CPAP titration.

Axis III

1. Obesity.

**"RECOMMENDATION:** The patient was asked to continue to use his nasal CPAP at night at a pressure of 10 cmH20. He should be using this with his Monarch mask. The patient was commended on his 20 lb. Weight loss and was encouraged to pursue further weight reduction. Finally, he was instructed to use his trazodone at 25 to 50 mg at bedtime if needed for insomnia. The patient will be seen on a p.r.n. basis at the office...,

according to the doctor.

On the basis of the totality of this record<sup>1</sup>, I make the following:

### **Findings of Fact and Conclusions of Law**

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to

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<sup>1</sup>As the Employer has accepted this claim as compensable and as the parties have taken Claimant's testimony three times by deposition (RX 15-RX 18), Claimant was excused from attending the hearing in view of his multiple medical problems.

establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant shifts the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita, supra; Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier, supra; Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not

caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56, 31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette**, 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hand/arm vibration syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

## **Injury**

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See 33 U.S.C. §902(2); U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc., 627 F.2d 455 (D.C. Cir. 1980).** A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation, 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981); Preziosi v. Controlled Industries, 22 BRBS 468 (1989); Janusiewicz v. Sun Shipbuilding and Dry Dock Company, 22 BRBS 376 (1989) (Decision and Order on Remand); Johnson v. Ingalls Shipbuilding, 22 BRBS 160 (1989); Madrid v. Coast Marine Construction, 22 BRBS 148 (1989).** Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).** Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mijangos, supra; Hicks v. Pacific Marine &**

**Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's repetitive use of pneumatic or vibratory tools in the course of his maritime employment has resulted in bilateral hand/arms symptoms, diagnosed as hand/arms vibration syndrome (CX 1), that the date of injury is November 20, 1991, that the Employer had timely notice of such injury, has authorized appropriate medical care and treatment and has paid to Claimant appropriate compensation benefits while he has been unable to return to work and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

### **Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975).

Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id.* at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

#### **Sections 8(a) and (b) and Total Disability**

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "Pepco"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).



Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a carpenter or trade planner. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. See **Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). See also **Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). Moreover, Carl Barchi, M.Ed., CDMS, the Employer's Vocational Consultant, has opined, as of August 17, 2000, that claimant "is unemployable due to the combined effects of the disabilities so noted." (RX 39) I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an

injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF**

**Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, *supra*.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5<sup>th</sup> Cir. 1968), *cert. denied*. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott**, 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.**, 9 BRBS 138 (1978), *aff'd mem.*, 617 F.2d 292 (5<sup>th</sup> Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on June 3, 1993, and that he has been permanently and totally

disabled from June 4, 1993, according to the well-reasoned opinion of Dr. Wainright. (CX 8)

## **Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

## **Section 14(e)**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 9), nevertheless has accepted the claim, provided the necessary medical care and treatment and

voluntarily paid compensation benefits for certain periods of time. (JX 1) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

### **Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

### **Section 8(f) of the Act**

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**,

676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), rev'd and remanded on other grounds sub nom. **Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), aff'd, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, supra, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984).

Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone, supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since November 6, 1978, (2) Claimant has sustained two myocardial infarctions in 1984, (3) that Claimant has experienced psychological problems for many years, (4) that he has experienced knee problems for years, requiring a knee replacement, (5) that he has suffered gastrointestinal problems for years, (6) that he had gained as much as 160 pounds in the five years since he stopped working, (7) that he has experienced obstructive sleep apnea for years, (8) that his cardiovascular problems have worsened over the years, and (9) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, his above-identified medical problems) and his November 20, 1991 injury as such pre-existing disability, in combination with the subsequent

work injury, has contributed to a greater degree of permanent disability, according to Dr. Gaeta. (RX 38) **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on November 20, 1991, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director**, OWCP, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the



claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. See also **Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams, supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper, supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23

BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti, supra**, at 681 F.2d 37. In the case at bar, Claimant's obesity also plays a part in his total disability, as reported by Dr. Gaeta. (RX 38)

### **Attorney's Fee**

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on July 21, 2000 (CX 24), concerning services rendered and costs incurred in representing Claimant between October 11, 1999 and June 21, 2000. Attorney David N. Neusner seeks a fee of \$1,824.00 based on 8 hours of attorney time at \$200.00 per hour and 3.5 hours of paralegal time at \$64.00 per hour.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained, the itemized services and the hourly rates charged. (RX 36)

In accordance with established practice, I will consider only those services rendered and costs incurred after September 15, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of \$1,824.00 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved.

#### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on June 4, 1993 and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of \$669.34, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his November 20, 1991 injury. The Employer shall also receive a refund, with appropriate interest, of any overpayments of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of \$1,824.00 as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between October 11, 1999 and June 21, 2000.

\_\_\_\_\_  
**DAVID W. DI NARDI**  
Administrative Law Judge

Dated:

Boston, Massachusetts  
DWD:jl